FORM NLRB-4477

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
(Brisbane, California)

BRISBANE LODGING LP d/b/a
RADISSON HOTEL SIERRA POINT 1/

Employer

and

HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES LOCAL 340, AFL-CIO

Petitioner

20-RC-17745 **DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. 2/

3. The labor organization*(s)* involved claim*(s)* to represent certain employees of the Employer. 3/

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act. 4/

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: 5/

All full-time and regular part-time housekeeping department employees, including housekeepers, laundry attendants, housemen and linen runners employed by the Employer at its Brisbane, California location; excluding all other employees, the Executive Housekeeper, housekeeping supervisors, clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit*(s)* who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll

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period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Hotel Employees and Restaurant Employees Local 340, AFL-CIO.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc**., 156 NLRB 1236 (1966); **NLRB. Wyman-Gordan Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. **North Macon Health Care Facility**, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before June 10, 2002**.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001**. This request must be received by the Board in Washington by June 17, 2002**.**

Dated June 3, 2002

at San Francisco, California

/s/ Robert H. Miller
Regional Director, Region 20

1/ The name of the Employer appears as amended at the hearing.

2/ The parties stipulated that the Employer is a Colorado limited Partnership with a place of business in Brisbane, California where it is engaged in the business in the provision of hotel services and that during the 12-month period ending January 21, 2001, the Employer received gross revenues in excess of $500, 000 and received goods and /or services valued in excess of $5,000 which originated from outside the State of California. Administrative notice is taken of *Brisbane Lodging LP d/b/a/Radisson Hotel Sierra Point* JD(SF)-19-02 wherein the Administrative Law Judge found that the during the 12-month period ending June 30, 2001, the Employer derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $5,000 which originated from points outside the State of California. In these circumstances, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this case.

3/ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4/ The Employer asserts that the petition in this case is barred by Section 9(c)(3) of the Act which provides that no election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. The Petitioner takes the contrary view.

The petition in this proceeding was filed on April 23, 2002. Administrative notice is taken of case 20-RC-17654 filed on February 14, 2001, wherein the Petitioner sought a representation election in the unit petitioned for herein. The election in Case 20-RC-17654 was held on February 14, 2001. The tally of ballots in that proceeding reflects that of the eligible employees voting, 7cast ballots for and 8 cast ballots against the Petitioner. There were six challenged ballots which were sufficient in number to affect the results of the election. A hearing on the challenged ballots was conducted before an Administrative Law Judge of the Board in October, November and December 2001. On March 18, 2002, the Administrative Law Judge issued her decision directing, among others, that certain of the challenged ballots be opened and counted. No exceptions to the decision of the ALJ were taken and, on April 18, 2002, the ballots were opened and counted. The tally of ballots reflects that 10 employees cast ballots for and 10 cast ballots against union representation. In these circumstances, on April 26, 2002, the undersigned issued a Certification of Results of Election in Case 20RC-17654 certifying that no labor organization had been selected as the representative of the unit employees.

Section 9(c)(3) of the Act states in pertinent part that:

> No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election has been held.

The Employer asserts that the date for determining the twelve-month period specified in Section 9(c)(3) commences on April 26, 2002, the date the results of the election in Case 20-RC-17654 were certified. The Petitioner asserts that the date for determining the twelve-month period specified in Section 9(c)(3) commences on February 14, 2002, the date the election was held. For the reasons set forth below, I find that the date for determining the twelve-month period begins on the date the election was held.

The Board has long held that in situations where no union is selected as the bargaining representative, the date for determining the twelve-month period specified in Section 9(c)(3) commences on the date of the balloting and not on the date that the Board finally determines the results of the balloting. See *Mallinckrodt Chemical Works*, 84 NLRB 291 292 (1949). In its post-hearing brief, while acknowledging this long standing precedent, the Employer argues that by its decision in *Retail Store Employee's Union Local No. 692 (Irvins, Inc.)* 134 NLRB 686 (1961), the Board implicitly overruled *Mallinckrod*t and its progeny and that the twelve-month period specified in Section 9(c) commences on the date the results of the election are certified. I find the Employer's contention to be without merit.

In *Retail Store Employees Local 692*, a Trial Examiner found that a Respondent union's post-election picketing was for an object proscribed by Section 8(b)(7)(B) of the Act. Section 8(b)(7)(B) provides, in pertinent part, that:

> it shall be an unfair labor practice for a labor organization or its agents-to picket or cause to be picketed . . .any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . .unless such labor organization is currently certified as the representative of such employees: (B) *where within the preceding twelve months a valid election under section 9(c) of this Act* . . . has been conducted. (emphasis supplied).

The Trial Examiner and issued an order recommending that the Respondent union cease and desist from picketing the employer for such object for a one year period following the date of the election. The General Counsel excepted to the Trial Examiner's recommended order urging the Board to find that the appropriate remedy in 8(b)(7)(B) cases should provide for no such picketing for a one year period computed from the date of the certification of the results of the election.

In its decision, the Board noted that the issue before it presented two distinct questions: the determinative date for the purpose of finding a violation of Section 8(b)(7)(B); and the determinative date for providing an appropriate remedy. With regard to the date of the violation, the Board held that in 8(b)(7)(B) cases, the decisive date for determining a valid election has been conducted under Section 9(c) of the Act is the date on which the certification of representative or certification of results of the election issues.

In reaching this conclusion, the Board expressly noted that

> Under long-established interpretation of Section 9(c)(3), the Board holds that the "twelve-month" limitation runs from the date of balloting and not from the date of the certification of results *where no union was selected as bargaining representative*. (emphasis in original)

At no point in this decision did the Board disavow this long-standing precedent.

Moreover, the Board expressly reaffirmed this long-standing precedent eight years after its *Retail Store Employees' Local 692* decision. Thus, in *Automation and Measurement Division of the Bendix Corporation,* 179 NLRB 140 (1969), the Board expressly rejected the motion of an employer to dismiss a petition on the basis that the 12-month period prescribed in Section 9(c)(3) should be computed from the date the court ruled the first election to have been a valid election rather than from the date of the election. In so doing, the Board stated:

> We find this contention without merit. It is settled Board practice in construing this part or Section 9(c)(3) to hold that in circumstances where a union loses an election, the Act allows the 12-month period to be measured from the date of the holding of the election." 179 NLRB at 140

In these circumstances, I find that Section 9(c)(3) of the Act does not constitute a bar to the petition in the instant proceeding. Accordingly, I decline to dismiss the petition herein on this basis.

5/ The unit appears as stipulated by the parties.

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